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CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTION OF TORTURE AND DETENTION

Report of the Working Group on Arbitrary Detention

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Executive summary

The Working Group on Arbitrary Detention was established by the Commission on Human Rights in its resolution 1991/42 and entrusted with the investigation of instances of alleged arbitrary deprivation of liberty. The mandate of the Group was clarified and extended by the Commission in its resolution 1997/50 to cover the issue of administrative custody of asylum-seekers and immigrants.

During the reporting period, the Working Group adopted 39 Opinions concerning 21 countries and 115 individuals. In 33 Opinions, it considered the deprivation of liberty to be arbitrary. In the same period, the Working Group registered and transmitted to Governments 34 communications.

Also during the reporting period, the Working Group transmitted a total of 107 urgent actions concerning 499 individuals to 45 Governments and the Palestinian Authority. Seventy of these urgent appeals were joint actions with other thematic or country mandates of the Commission on Human Rights. In 29 cases, the Governments concerned informed the Working Group that they had taken measures to remedy the situation of the victims.

During the reporting period, the Working Group was seized of a complaint relating to procedure before, and detention at the order of, the International Criminal Tribunal for the Former Yugoslavia; the complaint alleges that the procedure before the Tribunal is incompatible with articles 9, paragraphs 1 to 3 and 5, of the International Covenant on Civil and Political Rights. The Group examined the complaint in detail and concluded that the guarantees of the right to a fair trial laid down in the Statute, the rules of procedure and the rules of evidence of the Tribunal are compatible with relevant international human rights standards and legal norms. The Group's analysis of the complaint has been adopted as Deliberation No. 6.

The Working Group has continued to develop its follow-up procedure and has sought to engage in continuous dialogue with those countries visited by the Group, in respect of which it had recommended changes of domestic legislation governing detention. Following its twenty-eighth session, the Committee reminded the Governments of Nepal and Viet Nam and requested the Governments of Peru and Indonesia to provide follow-up information on the recommendations resulting from the Group's visit to those countries in 1994, 1996, 1998 and 1999, respectively. The Government of Viet Nam provided the Group with information on measures it had taken to implement the Group's recommendations, notably about changes to the Criminal Code and Code of Criminal Procedure and amnesties decreed in 1995, 1998 and 2000 which led to the release of thousands of detained individuals.

In its recommendations in the present annual report, the Group attaches particular importance to the following phenomena:

(a) *Arrest and detention for dissemination of "State secrets".* The Group recommends that Governments take all necessary measures, of a legislative or other nature, to ensure that any legislation and regulations concerning national or State security should in no case be extended to cover information relating to the protection either of the environment or of human rights standards;

(b) *Detention of conscientious objectors.* The Group recommended that all Governments which have not already done so adopt appropriate legislative or other measures to ensure recognition of the status of conscientious objectors, in accordance with an established procedure, and to see to it that, pending the adoption of such measures, the prosecution of conscientious objectors does not give rise to more than one conviction, so as to avoid the judicial system being used/abused to force a conscientious objector to change his conviction;

(c) *Issues relating to extradition.* The Group recommended that Governments lay down, in domestic law, the maximum permissible period of detention pending extradition of an individual to a requesting State and that the requesting State, after conviction and when imposing sentence on an individual, credit the period of detention served by the said individual pending extradition.

INTRODUCTION

1. The Working Group on Arbitrary Detention was established by the Commission on Human Rights in resolution 1991/42. Commission resolution 1997/50 spells out the revised mandate of the Group, which is to investigate cases of deprivation of liberty imposed arbitrarily, provided that no final decision has been taken in such cases by local courts in conformity with domestic law, with the standards set forth in the Universal Declaration of Human Rights and with the relevant international instruments accepted by the States concerned. Under this resolution, the Group is also given the mandate to examine issues related to the administrative custody of asylum-seekers and immigrants. The Working Group is composed of the following experts: Mrs. S. Villagra de Biedermann (Paraguay), Mr. L. Joinet (France), Mr. L. Kama (Senegal), Mr. K. Sibal (India) and Mr. P. Uhl (Czech Republic and Slovakia). At its eighteenth session (May 1997), the Group amended its methods of work to the effect that at the end of each mandate the Working Group shall elect a Chairman and Vice-Chairman. Pursuant to this amendment, the Group elected Mr. Sibal as Chairman-Rapporteur and Mr. Joinet as Vice-Chairman. At its twenty-eighth session in September 2000, the Group re-elected Mr. Sibal as Chairman-Rapporteur and Mr. Joinet as Vice-Chairman. The Group has so far submitted nine reports to the Commission, covering the period 1991-1999 (E/CN.4/1992/20, E/CN.4/1993/24, E/CN.4/1994/27, E/CN.4/1995/31 and Add.1-4, E/CN.4/1996/40 and Add.1, E/CN.4/1997/4 and Add.1-3, E/CN.4/1998/44 and Add.1 and 2; E/CN.4/1999/63 and Add.1-4; and E/CN.4/2000/4 and Add.1 and 2). The Working Group's initial three-year mandate was first extended by the Commission in 1994 and further extended in 1997, and in 2000 for another three years.

2. On 26 April 2000, the Commission on Human Rights adopted decision 2000/109 on enhancing the effectiveness of the mechanisms of the Commission. As a result of this decision, the composition of the Working Group will have to be gradually changed prior to the fifty-ninth session of the Commission in 2003. Pursuant to the decision, Mr. Roberto Garretón (Chile) resigned from the Group at the end of the twenty-seventh session and was replaced by Mrs. Villagra de Biedermann. Mr. Uhl resigned from the Working Group after the twenty-ninth session, on 1 December 2000, and had not been replaced at the time of the adoption of the present report.

I. ACTIVITIES OF THE WORKING GROUP

3. The present report covers the period January to December 2000, during which the Working Group held its twenty-seventh, twenty-eighth and twenty-ninth sessions.

A. Handling of communications addressed to the Working Group

1. Communications transmitted to Governments and currently pending

4. During the period under review, the Working Group transmitted 34 communications concerning 94 new cases of alleged arbitrary detention (10 women and 84 men) involving the following countries (the number of cases and individuals concerned for each country is given in parenthesis): China (6 cases - 9 individuals); Colombia (1 - 1); Cuba (1 - 1); Indonesia (1 - 6); Iran (Islamic Republic of) (1 - 1); Israel (3 - 24); Lithuania (1 - 1); Mexico (3 - 13);

Myanmar (2 - 2); Nepal (1 - 1); Peru (1 - 1); Qatar (1 - 1); Russian Federation (1 - 1); Sri Lanka (1 - 14); Syrian Arab Republic (3 - 4); United Arab Emirates (1 - 1); United States of America (1 - 1); Uzbekistan (3 - 4); Viet Nam (1 - 1); Yugoslavia (1 - 7).

5. Of the 20 Governments concerned, 9 provided information on all or some of the cases transmitted to them. These were: Syrian Arab Republic (reply to three communications); China (two cases), Lithuania, Mexico (one case), Russian Federation, Cuba, Sri Lanka (preliminary reply), Turkey (one case), United Arab Emirates.

6. Apart from the above-mentioned replies, the Governments of Chile, China, the Lao People's Democratic Republic, Myanmar and Turkey communicated information concerning cases on which the Group had already adopted opinions (see paras. 34-54 below).

7. The Governments of Israel, Indonesia, the Islamic Republic of Iran, Nepal, Uzbekistan and Yugoslavia did not provide the Working Group with replies to allegations transmitted to them though the 90-day deadline had expired. With regard to communications concerning Colombia (one case), China (one case), Mexico (two cases), Peru (one case), Qatar (one case), the United States (one case) and Viet Nam (one case), the 90-day deadline had not yet expired when the present report was adopted.

8. A description of the cases transmitted and the contents of the Governments' replies will be found in the relevant Opinions adopted by the Working Group (E/CN.4/2001/14/Add.1).

9. Concerning the sources which reported alleged cases of arbitrary detention to the Working Group, of the 34 individual cases submitted by the Working Group to Governments during the period under consideration, 11 were based on information communicated by local or regional non-governmental organizations (NGOs), 13 on information provided by international NGOs enjoying consultative status with the Economic and Social Council, and 10 by private sources.

2. Opinions of the Working Group

10. During its three 2000 sessions, the Working Group adopted 39 Opinions concerning 115 persons in 21 countries. Some details of the Opinions adopted during those sessions appear in the table hereunder and the complete texts of Opinions 1/2000 to 28/2000 are reproduced in addendum 1 to this report. The table further includes information about 11 Opinions adopted during the twenty-ninth session, details of which could not, for technical reasons, be included in an annex to this report.

11. Pursuant to its methods of work (E/CN.4/1998/44, annex I, para. 18), the Working Group, in addressing its Opinions to Governments, drew their attention to Commission resolution 1997/50 requesting them to take account of the Working Group's opinions and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty and to inform the Working Group of the steps they had taken. On the expiry of a three-week deadline the Opinions were transmitted to the source.

Opinions adopted during the twenty-seventh, twenty-eighth and twenty-ninth sessions of the Working Group

Opinion No.	Country	Government's reply	Person(s) concerned	Opinion
1/2000	Nigeria	Yes	Samuel Onuoha and 11 others *	Victims released, case filed
2/2000	Belarus	Yes	Roman Radikowski	Victim released, case filed
3/2000	Rwanda	Yes	Augustin Misago	Detention arbitrary, category III
4/2000	Peru	Yes	Sibyla Arredondo Guevara	Case forwarded to Human Rights Committee without determination on arbitrariness of detention
5/2000	Chile (To be reissued subsequently for technical reasons)	Yes	Dante Ramirez Soto	Detention arbitrary, category III
6/2000	Pakistan	No	Mohammed Salim	Detention arbitrary, category I
7/2000	Algeria	Yes	Rashid Mesli	Case filed (see also Opinion 20/1999)
8/2000	China	Yes	Jigme Gyatso	Detention arbitrary, category II
9/2000	Peru	Yes	César Sanabria Casanova	Detention arbitrary, category III
10/2000	Peru	Yes	Mirtha Ira Bueno Hidalgo	Detention arbitrary, category III
11/2000	Peru	Yes	Eleuterio Zárate Luján	Detention arbitrary, category III
12/2000	Japan	Yes	Yoshihiro Yasuda	Victim released, case filed
13/2000	Pakistan	No	Najam Sethi	Detention arbitrary, category III
14/2000	China	Yes	Phuntsok Wangdu	Detention arbitrary, category II
15/2000	Bahrain	Yes	Mohamed Ali Ahmed Al-Ekry	Detention arbitrary, category III
16/2000	Israel	No	R. Abou Faour et al.*	Detention arbitrary, category III
17/2000	Israel	No	Riad Kalakish; Samir Kassem; Tayssir Shaaban; A.A. Srour	Detention arbitrary, category III
18/2000	Israel	No	Ahmed Amour	Detention arbitrary, category I
19/2000	China	No	Phuntsok Legmon and Namdrol	Detention arbitrary, category II
20/2000	Syrian Arab Republic	Yes	Naji Azziz Harb	Detention arbitrary, category III
21/2000	Syrian Arab Republic	Yes	Fateh Jamus and 'Issam Dimashqi	Dete.:tion arbitrary, categories I and III
22/2000	Turkey	Yes	Hüda Kaya	Detention arbitrary, category II

Opinion No.	Country	Government's reply	Person(s) concerned	Opinion
23/2000	Haiti	No	Ernest Bennett, Edouard S. Boyer and 14 others*	Detention arbitrary, category III (all victims), category I (3 victims)
24/2000	Lithuania	Yes	Pedro Katunda Kambangu	Detention not arbitrary
25/2000	Myanmar	No	James Mawdsley	Detention arbitrary, categories I, II, III
26/2000	Lao People's Democratic Republic	No	Pa Tood and 24 others*	Detention arbitrary, category II
27/2000	Peru	No	Marco Antonio Sánchez Narváez	Detention arbitrary, category III
28/2000	China	Yes	Ngawang Sandrol	Detention arbitrary, category II
29/2000	Peru	No	Edilberto Aguilar Mercedes	Detention arbitrary, category III
30/2000	China	No	Rebiya Kadeer, Ablikim Abdiriyim	Detention arbitrary, category II
31/2000	Israel	No	Mustapha Dirani	Detention arbitrary, category I
32/2000	Uzbekistan	No	Makhbuba Kasymova	Detention arbitrary, categories II and III
33/2000	Syrian Arab Republic	Yes	Vejzi Ozgür	Detention arbitrary, category III
34/2000	United States of America	Yes	Jan Borek	Detention arbitrary, category III
35/2000	China	Yes	Yuhui Zhang	Detention arbitrary, category II
36/2000	China	No	Li Chang, Wang Zhiwen, Ji Liewu, Yao Jie	Detention arbitrary, category II
37/2000	Mexico	Yes (Received after adoption of opinion)	Jacobo Silva Nogales, Glora Arenas Agis, Fernando G. China, Felicitas P. Navas	Detention arbitrary, category III
38/2000	Myanmar	No	U Pa Pa Lay	Detention arbitrary, categories II and III
39/2000	Islamic Republic of Iran	No	A. Amir-Entezam	Detention arbitrary, category II

* The complete list of the persons concerned is available for consultation with the secretariat of the Working Group.

Note: Opinions 29/2000 to 39/2000, adopted during the twenty-ninth session, could not be reproduced as an annex to this report; they will be reproduced as an annex to the next annual report.

3. Legal analysis of allegations against the International Criminal Tribunal for the Former Yugoslavia (Deliberation No. 6)

12. The Working Group considered a communication concerning General Talic, who had been arrested in Vienna on 23 August 1999 on a warrant issued by the International Criminal Tribunal for the Former Yugoslavia and transferred on 25 August 1999 to the Tribunal's Detention Unit. By an order issued on 31 August 1999 the Tribunal placed him in pre-trial detention. The communication contests these measures on the grounds that they are based on provisions of the Tribunal's Statute and Rules of Procedure and Evidence that are inconsistent with article 9, paragraphs 1, 2, 3 and 5, of the International Covenant on Civil and Political Rights. The author of the communication also cites the jurisprudence of the European Court of Human Rights, thereby allowing the Working Group to refer to that jurisprudence in its argument.

(a) Admissibility

13. The Working Group considers that the communication does not fall under the Opinion procedure provided for in section III.A of its revised methods of work (E/CN.4/1998/44, annex I). This procedure presupposes that the communication contains a complaint against a State, which is not the case in the present instance, since the International Criminal Tribunal for the Former Yugoslavia is a subsidiary body of the Security Council. The Working Group does, however, consider that, looking beyond the case at hand, the matter is one of a purely legal interpretation of the norms of international law, and the Working Group is thus entitled to state its views as it has done in the past, not in the form of an Opinion, but in the form of a Deliberation to which it can refer if it receives further communications concerning the administration of justice by an international criminal tribunal that are based on the same legal reasoning.

14. The communication makes the following allegations against the Statute and Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia:

(a) First allegation: detention is the rule and release the exception (breach of article 9, paragraph 3, of the Covenant);

(b) Second allegation: no grounds are given in the arrest warrants and the detention orders, making the detention arbitrary (breach of article 9, paragraph 1, of the Covenant);

(c) Third allegation: the period of detention is indefinite (breach of article 9, paragraph 3, of the Covenant);

(d) Fourth allegation: the Rules of Procedure and Evidence make no provision for compensation of persons unlawfully arrested or detained (breach of article 9, paragraph 5, of the Covenant).

15. The Working Group notes that the fourth allegation is a consequence, and not a cause, of the arbitrariness that can characterize detention. It therefore considers this allegation to be inadmissible, since it does not fall within the Group's mandate as set out in Commission on Human Rights resolution 1997/50.

(b) Preliminary question: does the administration of international justice have specific features that distinguish it from national justice?

16. According to the communication, "the rules applied by the Tribunal, at least those that relate to the detention, do not meet international standards for guaranteeing the rights of the accused to a fair trial" (communication, p. 3, para. I, line 1).

17. Before considering this allegation on the merits, the Working Group raised the following preliminary question: should the Working Group view, as the communication does, the international norms in question as being applicable in the same way as they would be in a national criminal court trying ordinary crimes, or should they be interpreted in the light of the specific nature of such courts which derives from their international character and the crimes they are called on to try and judge? In other words, can the administration of justice in an international criminal court be simply equated with the administration of justice in a national criminal court? If the answer is yes, the application by the authors of the communication may have merit; if the answer is no, their application may be rejected.

(i) Specific features of the Tribunal deriving from its international jurisdiction

18. The major features that distinguish an international criminal court from a national criminal court are set out in the report of the Expert Group (A/54/634) which, at the initiative of the General Assembly (resolution 53/212 of 18 December 1998), was entrusted by the Secretary-General with evaluating the effective operation and functioning of the International Criminal Tribunal for the Former Yugoslavia. Some of the most significant features cited by the experts in their report were:

(a) The hybrid characteristics of the Tribunal's procedures, which combine elements of the common law and civil law systems (para. 23);

(b) The fact that the Tribunal's Rules of Procedure and Evidence embrace a broader range of complex matters than is apt to be found in comparable rules of national legal systems (para. 23);

(c) The lack of coercive powers (or even of injunction) in relation to the Tribunal's arrest warrants, which renders it dependent in that respect on the cooperation and assistance of national Governments and international forces (para. 25), cooperation that is not always immediately forthcoming;

(d) Dependence on States also in obtaining access to witnesses and victims and in obtaining evidence (para. 25), or in ensuring that indictees whose presence is essential for trying other accused parties are delivered into custody (para. 35);

(e) The existence of victims who are usually also direct witnesses, and whose security must be adequately ensured on both counts (Statute, art. 22) to encourage them, in the interest of "the proper administration of international criminal justice", to overcome their reluctance to testify. This again gives rise to certain situations that are not normally characteristic of national courts: witnesses testifying in locations that afford them better security, hearings in closed court sessions, testimony by deposition by video link from remote locations and voice and image distortion (paras. 191 and 192);

(f) The establishment of a Victims and Witnesses Section. In addition to the security of victims and witnesses before, during and after their appearance in court (individual protection plans), this Section is responsible for organizing their travel to and from the tribunal (tickets, visas and accommodation as well as material and, where necessary, psychological assistance).

(ii) The specific nature of the crimes prosecuted and judged by the Tribunal as an international court

19. The list of offences which the Tribunal is competent to try (Statute, arts. 2-5) reveals that all of them are "international crimes", whereas national courts, except in the very rare cases when a universal jurisdiction clause is invoked, do not generally try the crimes described in articles 2 to 5 and 7 of the Tribunal's Statute, namely:

(a) Grave breaches of the Geneva Conventions on the humanitarian law applicable in time of war;

(b) War crimes;

(c) Crimes against humanity;

(d) The crime of genocide.

20. On this point the Working Group noted with interest that, owing to the international dimension of these crimes and their extreme gravity, several international instruments, including the International Covenant on Civil and Political Rights, limit - again, with a view to the proper administration of justice - some of the rules protecting an accused person in order to prevent the abuse of these rules to abet impunity for international crimes. Examples of such limitations include:

(a) Article 15 of the Covenant, which sets out the principle of non-retroactivity of criminal laws in paragraph 1 and then interprets it in paragraph 2 as not prejudicing the "punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations";

(b) Article 1 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 26 November 1968;

(c) Article VII of the Convention on the Prevention and Punishment of the Crime of Genocide, which states that "these crimes shall not be considered as political crimes for the purpose of extradition";

(d) Article 1 of the Convention relating to the Status of Refugees of 14 December 1950, which uses a slight rewording of article 14, paragraph 2, of the Universal Declaration of Human Rights, concerning asylum, to stipulate that the rights deriving from refugee status shall not be enjoyed by "any person with respect to whom there are serious reasons for considering that ... he has been guilty of acts contrary to the purposes and principles of the United Nations".

In the light of these specific features, the Working Group is of the view that the norms of the Covenant cited in the communication cannot be interpreted as though they were simply being applied in a national court, since, unlike the Tribunal, such courts seldom try cases involving international crimes, as the Committee has pointed out.

(c) On the merits

21. As to the first allegation, that detention is the rule and release the exception (breach of article 9, paragraph 3, of the Covenant), it is true, as the communication rightly points out, that while the Statute contains no specific measures applicable to pre-trial detention, the Rules of Procedure and Evidence do. The Working Group has in fact noted that the latter contain rules very similar to those applied in national systems when the authors of extremely grave crimes are tried, this can be seen from the combined application of the two relevant rules of the Rules of Procedure and Evidence: rule 64 (Detention on remand) and rule 65 (Provisional release).

22. Once the accused has been served with an indictment confirmed by a judge, he or she is transferred to the seat of the Tribunal and placed in the Tribunal's detention facilities (art. 64). Thereafter the accused may not be released except on an order of the Tribunal and not of the Prosecutor (art. 65). It will be noted that the grounds most frequently cited by national legislation for placing or maintaining a person in detention are:

(a) The gravity of the breach and thus of the corresponding penalty, in that it creates a risk of flight (European Court of Human Rights, decision in the *Wemhoff* case, 27 June 1968);

(b) The lack of ties in the country (*Stögmüller* case, 10 November 1969).

23. In other words, the Working Group notes that in the case of international crimes or, in national legal systems, of extremely grave crimes, the legislation in most Member States, regardless of the type of legal system, uses similar criteria to determine the exact time period during which a judge may legitimately allow the exception (detention) to prevail over the rule (release).

24. In practice these criteria are, in order of importance:

(a) Preventing the flight of accused persons so that they remain accessible to the justice system;

(b) Preventing any pressure on witnesses and victims;

(c) Preventing any collusion or fraudulent collaboration between co-authors and/or accomplices.

25. In the light of the foregoing, the Working Group is of the view that two circumstances may legitimately be considered to constitute grounds for the detention contested in the communication:

(a) The extreme gravity of the crimes involved, and thus of the corresponding penalty;

(b) More generally, the fact that, with the single exception cited by the authors of the aforementioned report (A/54/634), the accused who were or are being sought, far from turning themselves in to the Tribunal, were or are, in virtually all cases, including the present case, in flight or shielded, by others and even by their own status; this explains why a warrant was systematically issued for their arrest and why they were subsequently placed in detention, as is generally done in all legal systems when a person in flight is to be kept accessible to the justice system.

In addition to these reasons, which justify in principle the decision to detain the accused, there are other grounds which can justify - even in a national court, and a fortiori in an international court - the prolongation of the period of pre-trial detention, as they do here.

26. The decision to prolong pre-trial detention is most often associated with the length of delays involved in the administration of justice by an international criminal court; these are due to the aforementioned constraints, which national courts experience only rarely and which are unavoidable (the hybrid nature of trials, the unusually complex nature of the cases heard, the lack of coercive powers, the importance - and often lack of - cooperation on the part of States, and the need to ensure the safety of witnesses and victims). Some of these guarantees which imply delay exist for the benefit of the accused as well, such as the requirement that all written materials must be available at least in French and English (and even in the accused's own language) or that the accused and the accusation must be kept on an equal footing owing to the contributions of the common law system to Tribunal proceedings.

27. In this context, the aforementioned decision by the European Court of Human Rights in the *Wemhoff* case strikes an interesting balance between the requirements that the duration be reasonable and that the truth be sought and established: "It should not be overlooked that, while an accused person in detention is entitled to have his case given priority and conducted with particular expedition, this must not stand in the way of the efforts of the judges to clarify fully the facts in issue, to give both the defence and the prosecution all facilities for putting forward their evidence and stating their cases and to pronounce judgment only after careful reflection on whether the offences were in fact committed and on the sentence" (*Wemhoff* decision, para. 17).

28. The Working Group considers that the first allegation is unfounded for the following reasons:

(a) The nature and the extreme gravity of the crimes and the constraints arising from their international dimension;

(b) The need to prevent guarantees aimed at the release of the accused from being misused to the advantage of the oppressor and to the detriment of the oppressed and efforts to combat impunity, which the Universal Declaration of Human Rights describes as "barbarous acts which have outraged the conscience of mankind" (Preamble, second para.).

29. With regard to the second allegation, that the arrest warrants and the detention orders are unjustified, which would confer an arbitrary character on the detention (breach of article 9, paragraph 1, of the Covenant), the Working Group finds this allegation to be unfounded for the following two reasons:

(a) A detention is arbitrary in the sense of article 9, paragraph 1, of the Covenant only if it is not accompanied by the guarantees provided for in paragraph 2 of that article (which the communication neglects to cite), which stipulates that "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." However, the procedure set out in the Statute and the Rules of Procedure and Evidence scrupulously respects the requirements of paragraph 2, as the documents attached to the communication attest:

(i) In the indictment, the grounds both de facto and *de jure*, are clearly spelt out (communication, annex 1[1]);

(ii) The indictment is subsequently submitted for confirmation to a judge of the Tribunal, who determines whether the charges are sufficient and, if so, decides whether it is to be circulated on a confidential or restricted basis (annex 2);

(iii) The Prosecutor then issues the arrest warrant, which is drafted in complete conformity with the aforementioned requirements of paragraph 2, as its wording indicates (annex 3):

> "HEREBY DIRECT the authorities of (name and country) to search for, arrest and surrender to the International Tribunal: (name of the accused and date)
>
> alleged to have [committed] in the territory of (name of country), between (date) and (date), a crime against humanity, punishable under articles 5 and 7 (1) of the Tribunal Statute,

[1] The annexes may be consulted in the secretariat.

and to advise the said (name) at the time of his arrest, and in a language he understands, of his rights as set forth in article 21 of the Statute and, *mutatis mutandis*, in Rules 42 and 53 of the Rules which are annexed hereto, and of his right to remain silent, and to caution him that any statement he makes shall be recorded and may be used in evidence. The indictment and review of the indictment (and all other documents annexed to the present warrant) must also be brought to the attention of the accused";

(iv) Lastly, at the time of detention, the order by the judge cites the arrest warrant, of which the accused is aware. Thus it cannot be maintained that the arrest warrants and the detention orders were issued without the accused being made aware of the charges and that the detention of the accused was therefore arbitrary.

(b) Rather than insisting that there are no grounds, the communication states that the detention is arbitrary because the charges are not precise enough, particularly as the victims of the alleged crimes are not specifically or personally identified;

(i) This criticism, which might be admissible in a case involving ordinary crimes, disregards another specific feature of international crimes, which is that their prosecution does not necessarily require that each victim be individually identified so long as victims can be identified by groups (genocide, crimes against humanity or the importance of keeping up-to-date information on mass graves);

(ii) Similarly, international criminal law does not require that the authors have personally and directly participated in the barbaric acts in question, so long as it can be proved that at the time they occurred, the authors were implicated by reason of their responsibilities: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime" (art. 7, para. 1). And again: "The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof" (para. 3).

The Working Group therefore finds the second allegation unfounded.

30. With regard to the third allegation, that the detention was indefinite and, given the length of the trial, too long to be consistent with the proper administration of justice (breach of article 9, paragraph 3, of the Covenant), the Working Group finds that, insofar as the indefinite length is concerned, none of the Covenant's provisions obligate States parties to fix a date by which the

period of pre-trial detention must end. The only requirement is that the detention period be "reasonable". However, the wording used in the communication in this regard is based on the theory that the term "reasonable time" in article 9, paragraph 3, of the Covenant is to be interpreted on the basis of rigid criteria that allow for no distinction between the administration of national and international justice.

31. This view is not shared by the Working Group, which, together with the experts who authored the aforementioned report (A/54/634), believes that many of the constraints provided for in the Statute have no equivalent in domestic law. The following examples can be cited:

(a) The abundance of procedural guarantees: rule 72 of the Rules of Procedure and Evidence offers the accused a whole series of preliminary exceptions with deadlines that affect the length of the proceedings, given that many accused persons make improper use of all forms of motions and such actions can be taken into consideration by the judge. During 1997/1998 the Tribunal received over 500 pre-trial motions, orders and applications;

(b) The complex nature of the evidence, which also prolongs the proceedings because of the constraints implicit in international jurisdiction:

(i) Specific difficulties related to the burden of collecting material evidence (such as the exhumation of mass various graves) and the gathering of testimony (in 1997/1998, some 699 witnesses testified, and their testimony covered almost 90,000 pages of transcript (para. 65));

(ii) The many problems posed by the organization and deployment of on-site fact-finding missions, all of which take place in another country (problems of language, administrative formalities, searching for witnesses and cooperation with local authorities).

The two main criteria used by both the Human Rights Committee and the European Court of Human Rights in determining whether the length of a trial is unreasonable or not are the actions of the applicant and the complexity of the investigation; it should be noted, however, that to date there has been no instance of any decision being taken by either of these two bodies to determine whether the length of a period of detention is reasonable in the context of prosecutions involving international crimes.

32. In the light of the foregoing, the Working Group considers that, the second condition having been met, the third allegation is unfounded.

(d) Conclusion

33. In the light of the foregoing, the Working Group notes that, insofar as the administration of justice by an international criminal court is concerned, the legal guarantees of a fair trial such as those provided by the Statue and Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia are consistent with the relevant international norms.

4. Government reactions to Opinions

34. The Working Group received information from the Governments of Chile, China, the Lao People's Democratic Republic and Turkey following the transmittal of its opinions to them; moreover, observations were received from the Government of Myanmar after the adoption of Opinion 25/2000 (James Mawdsley).

35. The above Governments responded to, contested or challenged the conclusions reached by the Group. The Government of Chile deplored that in adopting Opinion 5/2000 concerning Dante Ramírez Soto on 17 May 2000, the Working Group apparently did not have before it a submission from the Government dated 18 October 1999. Said submission consists of a report, dated 13 August 1999, from the Directorate for Order and Security of the Chilean Police (*Carabineros de Chile*). The report notes that Mr. Ramírez Soto was apprehended together with three other individuals when they attempted to elude a police check. In an ensuing exchange of gunfire, one Francisco Díaz Trujillo was killed; Mr. Ramírez Soto was injured and brought to a hospital, where he was treated. It is further noted that Dante Ramírez Soto had a prior criminal record, having been tried, in 1991, for robbery with use of violence; in addition, he was suspected of having participated in several bombings in 1990 and 1991. As the offence for which he was apprehended fell within military jurisdiction, his file was transmitted to the Second Military Court of Santiago and his case is being investigated by the Office of the Sixth Military Prosecutor under file number 1191/97. Under the terms of the indictment, Dante Ramírez Soto and one co-accused are charged with violations of article 8 of Law No. 17.798 on control of firearms. In respect of Dante Ramírez Soto alone, the charge of causing serious injuries to police officers in the line of duty (art. 416, para. 2, of the Code of Military Justice) was added on 7 July 1999. Mr. Ramírez Soto remains in detention pending trial, while his co-accused has been released on bail. By mid-October 1999, the trial of Mr. Ramírez Soto had not started.

36. During its twenty-ninth session, the Working Group considered the reply of the Government of Chile and examined whether the findings of Opinion 5/2000 should be modified in the light of the reply. It observed that the Government's observations did not in reality challenge several of the allegations contained in paragraphs 7 to 9 of the Opinion: that no arrest warrant was shown, and that eyewitnesses at the scene of the incident leading to Mr. Ramírez Soto's arrest confirmed that he was not carrying a firearm. As far as the argumentation in paragraph 11 of the Opinion is concerned, the Group notes that given the circumstances of Mr. Ramírez Soto's arrest, it might have been justified not to produce an arrest warrant at the place of arrest and that even without notification, Mr. Ramírez Soto would have been aware of the motives for his arrest. Furthermore, the State party's observations refute the argument that he did not belong to an armed group. On the other hand, the Group considers that the remainder of its observations - his referral to a military court for what must be qualified as a common crime, alleged irregularities in the investigations, alleged denial of access to certain elements of the case file to his counsel and repeated denial of bail - remain entirely valid. In the circumstances, the Group concludes that there is no reason to modify its findings, as contained in paragraphs 12 and 13 of Opinion No. 5/2000.

37. The Government of China, by submission of 22 November 2000 (received after the adoption of the present report), challenged the conclusions of the Working Group's Opinion No. 19/2000 (Phuntsok Legmon and Namdrol). It noted that after receiving the initial

allegations from the Working Group, the relevant authorities conducted meticulous and careful investigations; however, no records relating to the two individuals mentioned in the allegations were found, in spite of great efforts spent on verification and identification. It was an alleged mistake in the alleged victim's names, as identified by the Working Group, that caused difficulties for, and delays in, the Government's response. The Government considered it inappropriate that the Group had come to a "hasty conclusion" on the case when no reply from the Government had been received.

38. By submission of the same date on Opinion No. 28/2000 (Ngawang Sandrol), the Government of China expressed its disagreement with the conclusions of the Group. It reiterated that under Chinese law, the expression of ideas and faith do not per se constitute offences if no violations of the Criminal Code have been committed: no one, according to the Government, is convicted merely for holding different political views, and there are no "prisoners of conscience". Ngawang Sandrol was punished because she engaged in certain activities which posed a threat to the security and unity of the State. In the trial before and sentence of the Lhasa Intermediate People's Court, the facts and evidence were clear, and the sentence commensurate with the gravity of the crime; accordingly, there can be no question of her detention being arbitrary. The Government noted that Ngawang has recently begun to realize the seriousness of her crimes. In conclusion, the Government dismissed Opinions Nos. 19/2000 and 28/2000 as "entirely wrong" and expressed regret and dissatisfaction about the circumstances in which they were adopted, i.e. either without government replies or in a situation where, according to the Government, lack of information or misinformation had created difficulties for the authorities' investigation.

39. By submission of 13 September 2000, the Government of Turkey challenged Opinion No. 35/1999 on the case of Abdullah Öcalan as "unacceptable" and based on erroneous factual and legal assumptions. It submitted the following observations:

(a) Lawyers for Mr. Öcalan and public prosecutors had equal opportunities to reach Imrali Island. While it is true that judges and officials could use helicopters to reach the island, it was unrealistic to expect the Government to provide the lawyers with helicopters; instead, they were transferred to the island using ordinary means of transportation;

(b) During the preliminary investigation, the lawyers for Mr. Öcalan had "every kind of means" to contact their client and to examine the case file thoroughly. Upon an application from Mr. Öcalan's lawyers on 22 February 1999, permission to see him was granted and the meeting was scheduled to take place on 25 February 1999 although, at that date, the lawyers did not yet have the required power of attorney to represent Mr. Öcalan, who was represented by 11 lawyers throughout the proceedings;

(c) Military guards who were present during meetings between Mr. Öcalan and his lawyers were unable, according to the Government, to overhear the conversations and did not intervene in any manner: "nothing indicates that the presence of guards had any influence on the trial, intermediary decisions of the court and on the final judgment. Whether the United Nations Principles on the Role of Lawyers prohibit similar practices or not, one has to accept that the state of necessity is a basic universal principle of law in civilised communities";

(d) With regard to the allegation of harassment and intimidation of Mr. Öcalan's lawyers, the Government notes that some statements of his lawyers must be considered contrary to the ethics code of the legal profession, and that the lawyers had only themselves to blame for violent reactions from the public if they sought to be identified with their client. The Government denies that no inquiry was initiated into allegations of harassment and intimidation of the lawyers - on the contrary, the office of the chief public prosecutor started an investigation into these issues, which remains pending. Moreover, police officers were always present in the vicinity of the court and made every effort to prevent the lawyers from being harassed.

40. The Government rejects the Group's conclusion that the time spent in a plane repatriating him to Turkey should be regarded as time spent in a place of detention. It submits that no statements taken from Mr. Öcalan during his transport to Turkey were used against him during the trial.

41. The Government dismisses as a serious error the Group's examination and conclusion about the constitution, independence and impartiality of Turkish State Security Courts:

(a) The opinion erroneously identifies these courts as "military courts", although they were of non-military character even before the 1999 modification of the Turkish Constitution: thus, it is incorrect to characterize the change in composition of the State Security Court after the 1999 modification of the Constitution as a "demilitarization" of a "military court";

(b) The Group's conclusions on the prescriptions of the law on State Security Courts are said to be "thoroughly wrong" and contrary to the general principles of the Code of Criminal Procedure:

(i) The Opinion is said to erroneously differentiate the tribunal which initially tried Mr. Öcalan from the one after the modification of the law. Thus, the characterization of the court as a military one before the modification of the law and as a different type of civil court after the modification is wrong. There are a number of clauses in Law No. 2845 which clearly show that the tribunal was a civilian one, notably the fact that its decisions are subject to the control of the Supreme Court;

(ii) The civilian judge who replaced the military judge after the modification of the Constitution was not a judge who witnessed the proceedings out of private interest or because he was appointed by the Government for the purpose. Rather, he was a "complementary part of the tribunal according to law", a "reserve judge" who was appointed to the court before the beginning of the trial (article 3 of Law No. 2845). He is a complementary element of the State Security Court appointed by the High Council of Prosecutors and Judges, possibly years before the start of Mr. Öcalan's trial. The Government notes that it is customary and the general practice in many European countries to appoint "reserve judges".

(iii) The reserve judge is charged by law to be present during the proceedings in a specific case in the eventuality that one of the members of the court has to miss the proceedings. In this case, according to the law, the reserve judge will be associated with the proceedings on account of his knowledge of the case derived from the different stages of the procedure. This, the Government reiterates, is entirely in conformity with the practice of European tribunals.

42. Finally, the Government of Turkey deplores the fact that the Working Group decided to transmit its Opinion, on an *amicus curiae* basis, to the European Court of Human Rights, where the case of Mr. Öcalan is currently under examination. The Government considers this transmittal as an attempt at interfering with, and influencing, the procedure before the European Court and contrary to the principles of a fair and impartial trial.

43. During its twenty-ninth session, the Working Group carefully studied the reply of the Government of Turkey. The various objections raised by the Government, including the one relating to the transmittal of the case to the European Court of Human Rights on an *amicus curiae* basis, do not negatively impact the essential elements which form the legal basis of the Group's Opinion.

44. By note of 31 October 2000, the Government of Turkey challenged the Working Group's Opinion No. 36/1999 (O. Murat Ulke). It argues that rather than evaluating the activities for which Mr. Ulke was convicted as "single offences" (i.e. consisting of a single action and its uninterrupted continuing results), one should interpret Mr. Ulke's consistent refusal to perform his military service as "continuing offences": every time he was deprived of his liberty the "continuity" of his offence was broken, and every new refusal to perform military service constituted another new offence for which he was once again convicted and deprived of liberty.

45. The Government observed that that the principle *non bis in idem* means that the same action cannot be punished twice; it is generally accepted that for the principle to apply, identity of the act is required. In examining whether the principle was properly applied to the case of Mr. Ulke, the Government relies on two criteria: identity of the perpetrator and identity of the act. Only the latter is considered relevant in Mr. Ulke's case. In the Government's opinion, Mr. Ulke's trial, following his initial conviction, cannot be regarded as relating to "continuing offences" or a "single offence". The only similarity between the offences he committed could be his motive, conscientious objection. But between his successive convictions, continuity is lacking: as a result, these convictions cannot be regarded as a violation of the *non bis in idem* principle nor as constituting arbitrary detention.

46. The Government of Turkey bases itself on the following considerations:

(a) The Working Group did not consider the detention of Mr. Ulke from October 1996 to December 1996 to be arbitrary, only from January 1997 onwards. The prison term he served at the time in question was, according to the Government, for a speech he had given in which he called on Turkish citizens not to perform military service. He was found

guilty of insulting the military forces of the country for an article printed in a human rights publication but, owing to lack of jurisdiction of the court, the case was filed; these proceedings cannot be described as a violation of the principle of *ne bis in idem*, as a new legal subject was involved and the two acts in question were different;

(b) In 1997, Mr. Ulke was sentenced to a cumulative prison term of 10 months' imprisonment for having deserted from the armed forces, non-compliance with (military) orders, failure to enrol in and late arrival for service. The Government explained that these offences are not the same as those which Mr. Ulke previously committed, and thus this conviction cannot be said to constitute a violation of the principle *non bis in idem*;

(c) The Government affirms that there were interruptions between Mr. Ulke's various periods of detention and thus there was no element of "continuity"; each action had to be seen separately, not as a continuation of previous actions. Although Mr. Ulke frequently committed offences of the same nature, the "continuity" was interrupted by virtue of the various sentences he received and periods of detention served. Therefore, a "common offence" does not exist and a new, different offence was constituted after each sentence and period of detention. This interpretation, the State party noted, is shared by many international lawyers.

47. Finally, the Government noted that military service as provided for in article 72 of the Turkish Constitution is in conformity with article 4, paragraph 3 (b), of the European Convention on Human Rights and that detention for non-performance of such service is compatible with article 5, paragraph 1, of the European Convention and article 9, paragraph 1, of the International Covenant on Civil and Political Rights. Thus, the sentences against Mr. Ulke arise from his non-compliance with his obligations and are incompatible with neither the provisions of the European Convention on Human Rights nor the International Covenant on Civil and Political Rights.

48. The objections of the Government were considered by the Working Group at its twenty-ninth session. The Working Group believes that its Opinion is founded on a solid legal basis consistent with accepted jurisprudential norms.

49. On 6 December 2000, the Government of Turkey commented on the Working Group's Opinion No. 22/2000 (Hüda Kaya). It observes that during a security check carried out on the occasion of a demonstration on 9 October 1998, Ms. Kaya was found to be in possession of a text "expressly inciting the public to hatred and discrimination". During interrogation, she admitted that she had written and distributed the text. She was thereupon transferred to the judicial authorities on 12 October 1998, together with three other individuals. While the latter were released, Ms. Kaya was detained, but later released on bail. The reason for her second arrest in May 1999 was, according to the Government, her involvement in incidents occurring in Malatya after Friday prayers, in which demonstrators protested against measures taken to ensure freedom of thought and religion by the Rectorate of Inönü University. Demonstrators allegedly used violence against the police and damaged police and other property. Video recordings made by the police identified Ms. Kaya as having been involved in the incidents. As a result, she was arrested on 19 May 1999, by order of the competent court. Charges were filed against her and 75 other individuals detained by the police.

50. The Government of the Lao People's Republic, by note of 12 October 2000, challenged the conclusions of Opinion 26/2000 and contended that the allegations of the source "were only one of the series of fallacious allegations designed to discredit the image" of the country. It observed that by virtue of the country's Constitution, everyone is free to believe in or practise any religion. No one may be arrested solely on account of his or her religious affiliation, and only those who violate the laws, whether they adhere to the Buddhist or Christian faith, will be tried and convicted in accordance with the law. According to the Government, it is common knowledge that some 100,000 Christians are freely practising their religion in Laos and live in general harmony with the majority Buddhist population. Over 100,000 Lao would be in jail if the Government arrested individuals merely on account of their Christian faith.

51. By note of 27 September 2000, the Government of Myanmar submitted observations on the case of James Mawdsley, in respect of whom the Group had adopted Opinion No. 25/2000 on 14 September 2000. The Government's submission amounts not to a challenge of the Opinion but a belated submission on the merits. It confirmed that James Mawdsley had entered the country three times, in its opinion illegally, and added that his second deportation from Myanmar in 1998 was subject to the condition that if he entered the country again - which occurred in August 1999 - he would serve his suspended prison sentence. It confirmed that Mr. Mawdsley is currently serving a 17-year prison term.

52. The Government noted that Mr. Mawdsley was serving his sentence at Kyaing Ton prison, that he was in good health, and that he was granted all the rights to which prisoners are entitled under the Prison Act, including visiting rights; thus, he was said to have received 16 family visits and 25 consular visits.

53. The Working Group has noted the observations of the Government of Myanmar. It notes that with the exception of the observation that Mr. Mawdsley's second deportation in 1998 was conditional in that if he entered the country again he would be required to serve his sentence, none of the source's allegations have been refuted by the Government. In the circumstances, the Working Group sees no reason to change its conclusion that the detention of James Mawdsley was arbitrary.*

54. The Working Group was also informed of the release of person(s) dealt with in opinions by the Governments of: Belarus (2/2000 - Roman Radikovski); Nigeria (No. 1/2000 - Samuel Onuoha et al.); Japan (12/2000 - Yoshihiro Yasuda). It was informed by the respective sources of the release of James Mawdsley (Opinion No. 25/2000) and of Ahmad Amar (Opinion No. 18/2000). It was further informed of the release of a large number of Lebanese citizens, who were liberated from Al-Khiam detention centre in southern Lebanon in early June 2000 and whose cases had been dealt with in Opinion 16/2000 (R. Abou Faour et al. v. Israel) and Opinion 17/2000 (Riad Kalakish/Samir Kassem/Tayssir Shaaban/A.A. Srour v. Israel). The Working Group welcomes the release of these individuals.

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* Mr. Mawdsley was released from prison on 19 October 2000 and returned to the United Kingdom, after intercessions on his behalf by the Government of the United Kingdom of Great Britain and Northern Ireland and the French Presidency of the European Union.

5. Communications giving rise to urgent appeals

55. During the period under review the Working Group transmitted 107 urgent actions to 45 Governments (as well as to the Palestinian Authority) concerning 499 individuals. In conformity with paragraphs 22-24 of its methods of work, the Working Group, without prejudging whether the detention was arbitrary, drew the attention of each of the Governments concerned to the specific case as reported and appealed to it to take the necessary measures to ensure that the detained persons' right to life and to physical integrity were respected. When the appeal made reference to the critical state of health of certain persons or to particular circumstances, such as failure to execute a court order for release, the Working Group requested the Government concerned to undertake all necessary measures to have them released.

56. During the period under review, urgent appeals were transmitted by the Working Group as follows (the number of persons concerned is given in parentheses): 9 appeals to the Democratic Republic of the Congo (76); 8 appeals to the Palestinian Authority (55); 6 to the Russian Federation (39, including a generic one on the situation in Chechnya); 5 to Israel (23); 5 to Myanmar (20); 5 to Indonesia (15, including a generic appeal on the situation in Aceh province); 4 to the Islamic Republic of Iran (5); 4 to Pakistan (4); 5 to the Sudan (16); 4 to Turkey (17); 3 to Bahrain (14); 3 to Cameroon (5); 3 to China (6); 2 to the Lao People's Democratic Republic (18); 2 to Burundi (8); 2 to Ethiopia (23); 2 to India (18); 2 to Mexico (5); 2 to Turkmenistan (2); 2 to Uzbekistan (2); 2 to Viet Nam (10); 2 to Yugoslavia (6); 1 to Angola (1); 1 to Argentina (1); 1 to Azerbaijan (1); 1 to Bolivia (19); 1 to Brazil (1); 1 to Burkina Faso (6); 1 to Costa Rica (2); 1 to Cuba (1); 1 to Egypt (1, concerning victim in Opinion No. 10/1999); 1 to Haiti (1); 1 to Kyrgyzstan (1); 1 to the Libyan Arab Jamahiriya (8); 1 to Maldives (3); 1 to Malaysia (52); 1 to Mauritania (5); 1 to the Republic of Moldova (4); 1 to Nigeria (8); 1 to Romania (1); 1 to Rwanda (1); 1 to Saudi Arabia (1); 1 to Sri Lanka (1); 1 to Tunisia (1); 1 to Ukraine (1); and 1 to the United Arab Emirates (1).

57. Of these urgent actions, 70 were appeals issued jointly by the Working Group and other thematic or geographical special rapporteurs. These were addressed to the Governments of Angola, Azerbaijan, Bahrain (2), Bolivia, Brazil, Burkina Faso, Burundi (2), Cameroon, Cuba, the Democratic Republic of the Congo (9), Ethiopia (1), India (1), Indonesia (5), the Islamic Republic of Iran (4), Israel (2), the Lao People's Democratic Republic, Malaysia, Maldives, Mexico (2), Myanmar (4), Nigeria, Pakistan (2), the Russian Federation (5), Rwanda, the Sudan (4), Turkey (3), Turkmenistan (2), Uzbekistan (2) and Viet Nam (1); seven joint appeals were addressed to the Palestinian Authority.

58. The Working Group received replies to the urgent appeals addressed to the Governments of the following countries: Azerbaijan, Brazil, the Lao People's Democratic Republic (reply to one action), Bahrain (reply to three actions), Burkina Faso, Cameroon (reply to one action), China (reply to one action), Costa Rica (reply signed by the President of Costa Rica), Cuba, Egypt, Ethiopia (reply to one action), India (reply to one action), Indonesia (reply to one action), Israel (reply to one action), Kyrgyzstan, Mexico, the Russian Federation (reply to two actions), Saudi Arabia, Sri Lanka, the Sudan (reply to two actions), Tunisia, Turkey (reply to three actions), United Arab Emirates, Viet Nam (reply to one action). In some cases it was informed, either by the Government or by the source, that the persons concerned had never been detained or that they had been released, in particular in the following countries: Burkina Faso

(information of victims' release from the source), China (in respect of one case - reply from the Government), Indonesia (in respect of one case - information from the Government), Brazil (information from source and from Government), Tunisia (information from the Government), Yugoslavia (information from the source). In other cases (i.e. relating to Bahrain, Cameroon, Ethiopia, India, the Lao People's Democratic Republic, the Sudan, Turkey), the Working Group was assured that the detainees concerned would benefit from fair trial guarantees. The Working Group wishes to thank those Governments which heeded its appeals and took steps to provide it with information on the situation of the persons concerned, and especially the Governments which released those persons. The Group notes, however, that only about 27.5 per cent of Governments replied to its urgent appeals and invites Governments to cooperate under the urgent action procedure.

59. In addition to the above replies to urgent appeals, the Working Group received replies from the Governments of Bahrain, China, the Islamic Republic of Iran, Mexico and Saudi Arabia in respect of urgent appeals which had been addressed to these Governments in the course of 1999 and which had already been included in the Group's annual report for 1999 (E/CN.4/2000/4, para. 35 and 36). The Working Group equally wishes to thank these Governments for their replies. The Group was further informed of the release, on 1 November 2000 at the order of President Kostunica of Yugoslavia, of human rights activist Flora Brovina, on whose behalf an urgent appeal had been sent to the Government of Yugoslavia on 9 July 1999. The Group welcomes her release.

B. Country missions

1. Visits scheduled

60. The following visits have been scheduled for the forthcoming year (2001):

(a) Bahrain. During the fiftieth session of the Sub-Commission on the Promotion and Protection of Human Rights, the Permanent Representative of Bahrain to the United Nations Office at Geneva declared that his Government had agreed to extend an invitation to the Working Group on Arbitrary Detention for a visit to Bahrain (see E/CN.4/Sub.2/1998/SR.25). Consultations were held between the Group and the Bahraini authorities during the twenty-second, twenty-third, twenty-fourth, twenty-fifth and twenty-sixth sessions of the Group. Initially, the visit was planned for the course of 1999, but it could not be conducted on account of scheduling difficulties of the Bahraini authorities. On 6 July 1999, the Undersecretary of the Ministry of Foreign Affairs of Bahrain addressed a letter to the Vice-Chairman of the Group, requesting a deferral of the Group's visit to the year 2001. Following consultations during the fifty-first session of the Sub-Commission and the twenty-fifth session of the Working Group, the Group addressed a letter to the Bahraini authorities, requesting its visit to be scheduled during the year 2000. On 30 November 1999, the Permanent Representative of Bahrain to the United Nations Office at Geneva reiterated that the Group's visit should not take place until the year 2001. After further consultations, the Group's visit to Bahrain is now scheduled to take place from 25 February to 3 March 2001;

(b) Belarus. During the fifty-first session of the Sub-Commission, the Permanent Representative of Belarus to the United Nations Office at Geneva declared that the Government of Belarus would invite the Special Rapporteur on the independence of judges and lawyers and the Working Group on Arbitrary Detention to visit the country, and that at least one of the visits would take place before the fifty-second session of the Sub-Commission. Further to consultations with the authorities of Belarus during the Group's twenty-sixth session, the Group was informed that the Government of Belarus would invite the Special Rapporteur on the independence of judges and lawyers in 2000 and the Working Group in 2001. Further consultations with the Permanent Mission of Belarus to the United Nations Office at Geneva took place on 13 September 2000 and 29 November 2000. As of this writing, the visit is now scheduled to take place in late spring 2001;

(c) Australia. Pursuant to paragraph 4 of Commission resolution 1997/50, the Working Group initiated consultations with the Permanent Mission of Australia to the United Nations Office at Geneva in mid-1998, with a view to conducting a mission to Australia to examine the issue of administrative custody of asylum-seekers in that country. An agreement in principle for such a visit was obtained from the Government of Australia towards the end of 1999, and the Group had planned to visit Australia in the second half of May 2000; by letter of 2 May 2000, the Government informed the Group that this date was not convenient. Accordingly, the Group's visit has been suspended and postponed until further notice. On 4 December 2000, the Working Group sought information on other proposed dates for its visit, which had already been agreed to in principle.

2. Incident linked to previous country visit of the Working Group

Visit to China (E/CN.4/1998/44/Add.2)

61. In its annual report for 1998 (E/CN.4/1999/63, paras. 21-25), the Working Group described in detail its communications with the Chinese authorities concerning an incident which occurred during its visit to Drapchi prison on 11 October 1997. It regretted that the Government of China had not provided it with a reply to specific queries which the Group had addressed to the authorities on 18 September 1998. The Chinese authorities subsequently reaffirmed that the extension of the sentences of the three inmates identified in the Group's correspondence had nothing to do with the interview of one of the inmates by the Group. The authorities did not specify the nature of the offences for which the inmates received extended sentences; they merely contended that it was justified in extending their sentences for their new crimes.

62. The Working Group regrets that the Chinese authorities have not acceded to its request for more specific information about the nature of the alleged offences for which the inmates referred to above received extended sentences, and once again invites the Government to do so at its earliest convenience, so as to enable the Working Group to dispose of this matter definitively.

3. Follow-up to country visits of the Working Group

63. By resolution 1998/74, the Commission on Human Rights requested those responsible for the Commission's thematic mechanisms to keep the Commission informed about the follow-up to all recommendations addressed to Governments in the discharge of their mandates.

In response to this request, the Working Group decided, in 1998 (see E/CN.4/1999/63, para. 36), to address a follow-up letter to the Governments of the countries it visited, together with a copy of the relevant recommendations adopted by the Group and contained in the reports on its country visits. Throughout 1999, the Group discussed the modalities of its follow-up activities. It adopted a procedure under which it will systematically request the Governments of countries visited by the Group to inform it of initiatives the Governments have taken pursuant to the Group's recommendations.

64. Given its heavy workload, the Working Group has staggered its follow-up activities in respect of those countries it has visited. Priority was given to follow up on recommendations contained in the reports on the Group's first country visits. Accordingly, in October 1999, letters were addressed to the Governments of Viet Nam, Nepal and Bhutan, with a view to obtaining information from the Governments concerned on the implementation of the recommendations contained in the Group's reports on its visits to these countries (E/CN.4/1995/31/Add.4, E/CN.4/1997/4/Add.2 and E/CN.4/1997/4/Add.3, respectively). A detailed follow-up reply was received from the Government of Bhutan (see annual report for 1999, E/CN.4/2000/4, paras. 44 to 47).

65. As no replies were received from the Governments of Nepal and Viet Nam, reminders were addressed to them by letters dated 29 September 2000. Letters with requests for follow-up information were also addressed, on 29 and 30 September 2000, respectively, to the Governments of Peru and Indonesia, requesting information on such initiatives as the authorities might have taken to give effect to the recommendations contained in the Group's report to the Commission on Human Rights on its visits to these countries in 1998 and 1999 (E/CN.4/1999/63/Add.2 and E/CN.4/2000/4/Add.2, respectively).

66. Under cover of a note dated 22 November 2000, the Government of Viet Nam replied to the Group's request for follow-up information. It indicated that since Viet Nam had initiated its process of *Doi Moi* (Renovation), the civil and political and economic, social and cultural rights of its citizens had been consolidated and the legal guarantees for the rights of offenders had been strengthened. Thus, the revised Criminal Code of Viet Nam, adopted on 12 December 1999 and in force since 1 July 2000, illustrates a new and positive trend in the country's criminal justice system, which focuses on three major areas: (a) the decriminalization of many offences; (b) the reduction of the number of criminal offences; and (c) improvement of the regulations in favour of those convicted of offences.

67. As an example, the Government notes that the new Criminal Code abolished 12 criminal offences punishable under the previous (1985) Criminal Code, including offences relating to currency destruction (art. 98) and crimes against the socialist state (art. 86); reduced the scope of offences against national security by reducing some of them to the status of regular offences, such as hijacking (art. 87), disclosing State secrets and certified (classified) documents (art. 92) and illegal immigration (art. 89); and replaced many criminal punishments by fines. The number of offences subject to a capital sentence was reduced to 29 from 44 (which included article 75 - infringement of national territorial security - and article 84 - attack against and destruction of detention camps). Furthermore, capital punishment can no longer be imposed on pregnant

women or on women who are caring for infants under the age of 3 years. The Criminal Procedure Code was also amended, laying down in more precise terms the responsibilities of the prosecution and of prosecutors, to guarantee due process of law and to avoid instances of arbitrary detention.

68. The Government observed that complementing the above shift in criminal justice policy, the President of the Republic has granted mass amnesties to thousands of detainees on several special occasions:

(a) In 1995, 3,303 detainees were released under the terms of a national amnesty, on the occasion of the twentieth anniversary of the country's reunification;

(b) In 1998, 7,849 detainees were amnestied on two special occasions;

(c) On the occasion of the twenty-fifth anniversary of the country's reunification, on 30 April 2000 a mass amnesty was granted to 12,264 prisoners. A second amnesty was decreed on the occasion of the National Day, 2 September 2000, from which another 10,693 prisoners benefited. In addition to the amnesties, the authorities reduced the length of the prison sentences of a sizeable number of detainees: in 2000, 10,131 detainees benefited from a reduction of their sentence.

69. The Government concluded that the above amnesties have had a positive impact and positive results, with the number of recidivists being as low as 100. The prospect of an amnesty is said to have encouraged many detainees in their re-education process, so they can reunite with their families at an early date and reintegrate into society.

II. COOPERATION WITH THE COMMISSION ON HUMAN RIGHTS

70. In various resolutions adopted at its fifty-sixth session, the Commission on Human Rights formulated requests and provided guidance to the Group.

Resolution 2000/36, "Question of arbitrary detention"

71. The Group has sought at all times, as requested by the Commission, to avoid duplication of effort with other mechanisms of the Commission. However, with a view to improved coordination, it has nonetheless informed bodies holding other mandates of cases brought before it where this would enable them to intervene. The Group did so in case No. 4/2000 (Sibyla Arredondo Guevara), which it transmitted to the Human Rights Committee for appropriate action. On 70 occasions, the Working Group issued urgent appeals jointly with other thematic mechanisms of the Commission.

72. In a number of cases, the Governments concerned responded favourably to the urgent actions that had been sent by the Group: in the case of Taoufik Chaieb, a Tunisian human rights defender on whose behalf the Group addressed an urgent appeal to the Tunisian authorities on 16 August 2000 and who was released on 30 August; in the case of two human rights defenders in Aceh province, Indonesia, on whose behalf the Group addressed an urgent appeal to the Indonesian authorities on 6 January 2000; and in the case of six Burkina Faso citizens and

human rights defenders on whose behalf the Group sent an urgent appeal on 17 April 2000. On 19 October 2000, the Working Group was informed of the release of James Mawdsley, a human rights defender who had been serving a 17-year prison term in Myanmar, and in respect of whom the Working Group had adopted Opinion No. 25/2000 at its twenty-eighth session; Mr. Mawdsley was released after the intercessions of the Governments of France and the United Kingdom.

Resolution 2000/86, "Human rights and thematic procedures"

73. In paragraph 5 (c) of this resolution the Working Group is requested to continue close cooperation with relevant treaty bodies and country rapporteurs. Throughout the reporting period, the Group cooperated closely with both human rights treaty bodies and geographic special rapporteurs. It addressed several joint urgent appeals with geographic rapporteurs to the Governments concerned; it participated in the elaboration of the list of issues for the examination of several periodic reports examined by the Human Rights Committee under article 40 of the International Covenant on Civil and Political Rights; and received information about cases of alleged arbitrary detention from human rights treaty bodies.

Resolution 2000/68, "Impunity"

74. The Group shares the views of the Commission on Human Rights concerning the need to put an end to impunity for the most serious human rights violations. In this connection, it welcomes the fact that some of the most significant perpetrators of human rights violations are being prosecuted in the competent courts either in their own country or in other countries.

75. In Opinion No. 23/2000 concerning Haiti, several of the victims whose detention the Group considered to be arbitrary had been kept in detention in spite of judicial decisions ordering their release. The Group noted that the Chief Prosecutor of Port-au-Prince, who had failed to implement the court orders, had done so previously in other cases, and requested the Government to put an end to the impunity with which the Chief Prosecutor had been allowed to defy the court orders (Opinion of 14 September 2000, para. 10).

Resolution 2000/46, "Integrating the human rights of women throughout the United Nations system"

76. Of the cases handled by the Group from its twenty-seventh to twenty-ninth sessions, only 10 related to women. In none of these cases, however, was gender the primary or secondary reason for the deprivation of liberty (as referred to in resolution 2000/46). For a number of years the Group has been incorporating the gender perspective in its reports, especially for statistical purposes, as requested by the Commission in paragraph 14 of the resolution.

Resolution 2000/45, "Elimination of violence against women"

77. The Group was apprised of the fate of 22 women in 14 countries. Thus, it adopted Opinion No. 30/2000 on the case of Rebiya Kadeer, a businesswoman detained in Xinjiang (Autonomous) Region, China; addressed an urgent appeal to the Government of Myanmar in the

case of Nobel laureate Aung San Suu Kyi, who had been placed under house arrest after a stand-off with the Government in September 2000 and whose case had already previously prompted the Working Group to adopt Deliberation No. 1 (see E/CN.4/1993/24); dealt with the cases of several women detained and reportedly ill-treated at the former Al-Khiam detention centre in southern Lebanon, including journalist Cosette Ibrahim; and that of Ngawang Sandrol, a Tibetan nun detained in a Chinese penitentiary for having militated for Tibetan autonomy, and in respect of whom the Group adopted Opinion No. 28/2000.

Resolution 2000/52, "Rights of persons belonging to national or ethnic, religious and linguistic minorities"

78. As in previous years, the Working Group was informed of the detention of persons who had acted in defence of the rights of ethnic minorities. It issued an urgent appeal to the Government of Ethiopia on 9 May 2000 in respect of 22 members of the Oromi minority, who were detained in different towns of the Oromi region in March and April 2000. The Group further issued an urgent appeal on behalf of eight members of the Ogoni minority in Nigeria, who were arrested on 11 and 13 April 2000 at K-Dere village.

Resolution 2000/80, "Advisory services and technical cooperation in the field of human rights"

79. The resolution notes that advisory services and technical cooperation provided at the request of Governments constitute effective means of promoting and protecting human rights, democracy and the rule of law. The Group believes that such services must be provided to countries which have made significant efforts to put an end to systematic human rights violations and show, through the implementation of serious and effective domestic measures, that they have put in place policies to guarantee the effective enjoyment of human rights and fundamental freedoms by their peoples. Such services must, in the Group's view, include both State institutions and organizations that are most representative of civil society in the field of human rights. The Group welcomes progress made in this respect, and expresses its appreciation for the fact that the seventh annual meeting of special rapporteurs representatives, independent experts and chairpersons of working groups addressed this issue in some detail (see E/CN.4/2001/6, paras. 51 to 58).

Resolution 2000/61, "Human rights defenders"

80. The Group remains concerned at the high number of reported arbitrary arrests and detentions of human rights defenders. It welcomes the establishment of the new mandate of Special Representative of the Secretary-General on the situation of human rights defenders and hopes to be in a position to coordinate its activities with those of the Special Representative. In 2000, the Working Group addressed numerous urgent appeals to Governments on behalf of detained human rights defenders; it expresses its appreciation to those Governments (see para. 72 above) who responded favourably to the Group's request.

III. INITIATIVES OF THE WORKING GROUP

81. The Working Group notes that issues concerning the extradition of individuals raise questions related to deprivation of liberty. In the absence of an international convention on extradition issues, disparate extradition procedures applicable in varying jurisdictions make the liberty of individuals subject to municipal laws. A large number of domestic procedures do not provide for a maximum period of detention within which extradition procedures must be completed. Lack of uniformity subjects individuals facing extradition proceedings to deprivation of liberty in varying degrees, depending on the applicable domestic procedure. Yet another aspect relates to the period of deprivation of liberty pending extradition not being included in the sentence, upon extradition and subsequent conviction in the requesting State. The Working Group observes that these and other related aspects will be considered by it in a future deliberation, in an attempt to bring about uniformity and rationality in matters relating to deprivation of liberty of persons pending extradition or extradited persons.

82. The Working Group believes that the right of a convict to be considered for parole is a valuable right, the frequent and continual violation of which in a given situation unreasonably impacts on the deprivation of liberty of the convict and renders his continued detention arbitrary. In this context, it would be advisable, for the sake of certainty and transparency, that such principle be incorporated into the Working Group's working methods. At its twenty-ninth session, the Working Group further elaborated its working methods as adopted in 1991 ("Principles applicable to the consideration of cases submitted to the Working Group", E/CN.4/1992/20, annex I) and revised in 1997 ("Revised methods of work", E/CN.4/1998/44, annex I), as follows:

> In annex I to document E/CN.4/1991/20, *change* the title of section C to "Situation after sentencing" and *add* a new paragraph 6 to the end of the section as follows:
>
> > 6. Cases of violations of international human rights standards applicable to the execution of sentences.

IV. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

83. Acceptance, transparency and cooperation in the context of requests for country visits is the surest way to further the cause of human rights by developing mutual respect and understanding between Member States and United Nations human rights mechanisms.

84. Deprivation of liberty in all its manifestations requires the Working Group to take *suo motu* initiatives and formulate principles and methods of work to combat arbitrariness.

85. Timely responses with full disclosure from Member States furthers the cause of objectivity in rendering opinions; responses by Member States after the opinion is adopted generate misunderstandings.

B. Recommendations

Recommendation 1: human rights and State secrets

86. The Working Group is seriously concerned by the increasing misuse of the term "State secrets" to describe certain information the collection and dissemination of which are protected as fundamental freedoms under article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights.

87. The Working Group has actually learned of cases in which persons involved in environmental protection or the defence of human rights have been tried and sentenced for having divulged "State secrets", or even having engaged in espionage, by:

(a) In the first instance, bringing to national and international attention the threats posed to the environment, environmental protection and the right to life by the dumping of nuclear waste at sea;

(b) In the second instance, gathering and disseminating, particularly abroad, information relating to allegations concerning victims of human rights violations.

88. In the light of these cases, the Working Group considers:

(a) In the first case, that actions that threaten the environment and environmental protection know no borders, particularly where radioactive pollution is concerned, and that consequently it must be possible to exercise the freedom of environmental criticism, which derives from the freedom of expression and opinion, "regardless of frontiers", as stipulated in article 19 of both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights;

(b) In the second case, that the usage of the term "State secret" runs counter to the relevant United Nations norms in the matter, which authorize and encourage the collection and dissemination of such information both by defenders of human rights, in the context of special or conventional procedures, and by States, in the context of the procedure involving communications between States set out in article 41 of the International Covenant on Civil and Political Rights.

89. The Working Group wishes to recall in this connection that the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms stipulates that:

(a) "For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right ... to communicate with non-governmental organizations" (art. 5);

(b) "Everyone has the right, individually and in association with others ... to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems" (art. 6).

90. In the light of the foregoing, the Working Group recommends that Governments take all necessary measures, of a legislative or other nature, to ensure that any legislation concerning national or State security is in no case extended to cover information relating to the defence and protection of either the environment or human rights.

Recommendation 2: detention of conscientious objectors

91. The Working Group notes that conscientious objection - which has its theoretical basis in the freedom of conscience and thus of opinion - gives rise, particularly in countries that have not yet recognized conscientious objector status, to repeated criminal prosecutions followed by sentences of deprivation of liberty which are renewed again and again.

92. The question before the Working Group was whether, after an initial conviction, each subsequent refusal to obey a summons to perform military service does or does not constitute a new offence capable of giving rise to a fresh conviction. If it does, deprivation of liberty, when applied to a conscientious objector, is not arbitrary, provided that the rules governing the right to a fair trial are respected. If it does not, detention must be considered arbitrary as being in breach of the principle of *non bis in idem*, a fundamental principle in a country where the rule of law prevails, as borne out by article 14, paragraph 7, of the International Covenant on Civil and Political Rights, which states that no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or punished. This principle is the corollary of the principle of *res judicata*.

93. Notwithstanding the above, repeated incarceration in cases of conscientious objectors is directed towards changing their conviction and opinion, under threat of penalty. The Working Group considers that this is incompatible with article 18, paragraph 2, of the International Covenant on Civil and Political Rights, under which no one shall be subject to coercion which would impair his freedom to have or adopt a belief of his choice.

94. Accordingly, the Working Group recommends that all States that have not yet done so adopt appropriate legislative or other measures to ensure that conscientious objector status is recognized and attributed, in accordance with an established procedure, and that, pending the adoption of such measures, when de facto objectors are prosecuted, such prosecutions should not give rise to more than one conviction, so as to prevent the judicial system from being used to force conscientious objectors to change their convictions.

Recommendation 3: extradition issues

95. The Working Group recommends that Governments lay down, in domestic law, the maximum permissible period of detention pending extradition of an individual to the requesting State.

96. The Group further recommends that the requesting State, upon conviction and while imposing sentence on the extradited individual, take into account the period of detention served by him/her pending extradition by giving credit for that period of detention.

Annex

STATISTICS

(Covering the period January-December 2000. Figures in parentheses are corresponding figures from last year's report.)

A. Cases of detention in which the Working Group adopted an opinion regarding their arbitrary or not arbitrary character

1. Cases of detention declared arbitrary

	Female	*Male*	*Total*
Cases of detention declared arbitrary falling within category I	0 (0)	3 (0)	3 (0)
Cases of detention declared arbitrary falling within category II	3 (0)	36 (32)	39 (32)
Cases of detention declared arbitrary falling within category III	7 (0)	42 (14)	49 (14)
Cases of detention declared arbitrary falling within categories II and III	1 (0)	1 (27)	2 (27)
Cases of detention declared arbitrary falling within categories I and II	0 (0)	0 (0)	0 (0)
Cases of detention declared arbitrary falling within categories I and III	0 (0)	5 (26)	5 (26)
Cases of detention declared arbitrary falling within categories I, II and III	0 (0)	1 (0)	1 (0)
Total number of cases of detention declared arbitrary	11 (0)	87 (99)	98 (99)

2. Cases of detention declared not arbitrary

Female	*Male*	*Total*
0 (0)	1 (8)	1 (8)

B. Cases which the Working Group decided to file

	Female	*Male*	*Total*
Cases filed because the person was released, or was not detained	0 (2)	15 (5)	15 (7)
Cases filed because of insufficient information	0 (0)	0 (0)	0 (0)

C. Cases pending

	Female	*Male*	*Total*
Cases which the Working Group decided to keep pending for further information	0 (0)	0 (1)	0 (1)
Cases transmitted to Governments on which the Working Group has not yet adopted an opinion	2 (13)	49 (169)	51 (182)
Total number of cases dealt with by the Working Group during the period January-December 2000	13 (15)	151 (282)	164 (297)

D. Cases of alleged detention transferred by the Working Group to other human rights mechanisms

Female	*Male*	*Total*
1 (0)	0 (6)	0 (6)